No. 44857-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Timothy Restorff,

Appellant.

Cowlitz County Superior Court Cause No. 13-1-00043-9

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. THE COURT VIOLATED MR. RESTORFF'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY FAILING TO CONDUCT ADEQUATE INQUIRY INTO THE BREAKDOWN OF HIS RELATIONSHIP WITH HIS ATTORNEY.

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006); *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross,* 156 Wn.2d at 610. The focus of the inquiry should be on the nature and extent of the conflict between the accused and his/her attorney, not on whether counsel is minimally competent. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 776-777 (9th Cir. 2001).

Here, the court responded to Mr. Restorff's concerns by ruling only that defense counsel's performance was not deficient. RP 10. This was improper. *Adelzo-Gonzalez,* 268 F.3d at 776-777. Even so, the state argues that the court conducted sufficient inquiry into the attorney-client conflict. Brief of Respondent, pp. 11-14. According to Respondent, the court did not end the inquiry after the first time Mr. Restorff raised it. Brief of Respondent, p. 12.

This is not true.

When Mr. Restorff first brought up the problems with his attorney, the court simply cut him off after determining that counsel likely needed more time to perform competently. RP 1-4. Defense counsel asked for more time to go over a plea offer with his client. RP 1. Mr. Restorff told the court that he didn't want the case set over. When Mr. Restorff told the judge that he was "not going to talk to" his attorney, the court simply responded: "I understand that." RP 3. Rather than conduct any inquiry into Mr. Restorff's concerns, the court summarily dismissed the matter, set the case over for a week despite his protestations, and stated: "I've said what I've said and we're done." RP 4.

The next hearing was before a different judge. RP 6. Mr. Restorff again informed the court that he was trying to "fire" his attorney. RP 6. He explained that he did not want to talk to defense counsel because "he doesn't make me feel confident at all by any standing." RP 9. Predictably, defense counsel spoke up to defend his competence. RP 9-10.

The court did not offer Mr. Restorff any opportunity to respond to what his attorney said. RP 10. When Mr. Restorff attempted to speak again, the court threatened to hold him in contempt. RP 11. Even so, the state argues that the inquiry was sufficient because the court initially asked Mr. Restorff two questions. Brief of Respondent, p. 12-13. But a process in which Mr. Restorff was never able to respond to his attorney's

statements does not constitute a "full airing of the concerns." *Cross,* 156 Wn.2d at 610. The court failed to undertake a meaningful evaluation of the conflict. *Cross,* 156 Wn.2d at 610.

The state points out that Mr. Restorff told the court that he had decided to "put[] his trust in" his attorney by the time trial started. Brief of Respondent, pp. 14 (*citing* RP 13-14). Respondent does not explain what other choice Mr. Restorff had after the court failed to conduct meaningful inquiry into the breakdown and threatened to hold him in contempt. The court did not conduct sufficient inquiry to ease Mr. Restorff's apprehensions or to collect information sufficient to make a decision about the nature and extent of the conflict with his attorney. *Adelzo-Gonzalez*, 268 F.3d 772.

The court violated Mr. Restorff's right to counsel by failing to inquire into the breakdown of the attorney-client relationship. *Adelzo-Gonzalez*, 268 F.3d at 777-78. Mr. Restorff's conviction must be reversed. *Id.* at 781.

II. THE COURT MISCALCULATED MR. RESTORFF'S OFFENDER SCORE BY ADDING POINTS FOR NON-COMPARABLE AND WASHED-OUT CONVICTIONS.

A. Mr. Restorff's Oregon conviction is not comparable to a Washington felony.

A sentencing court may not use an out-of-state to increase an offender score unless the state proves comparability. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

Mr. Restorff was convicted in 1991 under the Oregon statute for first degree sexual abuse. The most closely analogous Washington statute, however, has two elements not included in the Oregon offense. Former ORS 163.425 (1987); Former RCW 9A.44.083 (1990). Conviction under the Washington statute requires that the accused be at least thirty-six months older than, and not married to, the alleged victim. Former RCW 9A.44.083 (1990). The broader Oregon statute requires neither of those things. Former ORS 163.425 (1987).

The right to a jury trial prohibits a sentence beyond the statutory maximum based on "facts" that have not been proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 499, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. Amends. VI, XIV. Likewise, it would "(at least) raise serious Sixth Amendment concerns" for a sentencing court find a prior conviction comparable based on facts that were not necessarily proven beyond a reasonable doubt. *Descamps v. United States*, 133 S.Ct.

2276, 2288, 186 L.Ed.2d 438 (2013) *reh'g denied,* 11-9540, 2013 WL 4606326 (2013). Even so, the state argues that the convictions are comparable based on conjecture and un-proven allegations in the Oregon indictment. Brief of Respondent, pp. 19-25. But those "facts" were neither admitted nor proven beyond a reasonable doubt. A finding of comparability based on the state's argument would violate Mr. Restorff's constitutional rights. *Descamps,* 133 S.Ct. 2276.

Respondent does not address Mr. Restorff's Sixth Amendment claim. Brief of Respondent, pp. 16-25. Instead, the state employs the method for proving comparability established before *Apprendi*, *Blakely*, and *Descamps* were decided. Brief of Respondent, pp. 16-17 (*citing to State v. Morely*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). Respondent's reliance on *Morely* is misplaced. An out-of-state conviction may not be deemed comparable on the basis of judicial factfinding. *Descamps,*133 S.Ct. 2276.

Even under the pre-*Apprendi* method for determining comparability, however, the state cannot prove that Mr. Restorff's 1991 Oregon conviction adds a point to his offender score. If an out-of-state statute is broader than the analogous Washington statute, the court may conduct a limited factual comparison looking only to facts that were

admitted, stipulated, or proved beyond a reasonable doubt.[1] *State v. Tewee*, --- Wn. App. ---, 309 P.3d 791, 793 (Sept. 24, 2013).

Mr. Restorff admitted only that he "recognize[d] a probable conviction if tried" for count 1 of his 1991 indictment. Sentencing Ex. 2, p. 2. Nonetheless, the state relies on his birthdate as listed on the heading on that indictment to demonstrate that he was 36 months older than the alleged victim of that offense. Brief of Respondent, pp. 19, 24. But Mr. Restorff did not have any reason admit to or contest the accuracy of the listed birth date as part of his plea. CP 73. The 36-month age difference required by the Washington statute was not admitted, stipulated to, or proved as part of Mr. Restorff's Oregon conviction. RCW 9A.44.083 (1990); *Tewee*, 309 P.3d at 793.

The language of the charge to which Mr. Restorff pled guilty and the factual basis for the plea do not mention whether he was married to the alleged victim. Sentencing Ex. 2. Still, the state argues that the language of a dismissed charge demonstrates that they were unmarried. Brief of Respondent, pp. 21-24. Respondent points out that the charging language for count III – which was dropped – demonstrates that Mr. Restorff and the alleged victim were not married. Brief of Respondent, p. 19. But

[1] As noted, this is no longer true following *Apprendi* and its progeny.

nothing in that section of the indictment was admitted, stipulated, or proved beyond a reasonable doubt. *Tewee*, 309 P.3d at 793.

A sentencing court may not infer that an accused person and alleged victim are unmarried when it is not established as part of the record of an out-of-state conviction. *State v. Arndt*, --- Wn. App. ---, 320 P.3d 104, 114 (2014). This is true *even if* the alleged victim is younger than the minimum age required to marry in the state of conviction. *Id.* Nevertheless, the state argues that Mr. Restorff and the alleged victim could not have been married because she was too young to marry in Oregon. Brief of Respondent, pp. 21-24. Respondent's argument is directly foreclosed by *Arndt*. *Id.* The state also fails to address the possibility that Mr. Restorff and the alleged victim could have married in a different state or even in another country. Brief of Respondent, pp. 21-24.

Because marriage was not at issue in the Oregon case, Mr. Restorff had no reason to admit or deny that he and the alleged victim were unmarried. That element of the Washington statute was neither admitted, stipulated to, nor proved in Mr. Restorff's Oregon conviction. RCW 9A.44.083 (1990); *Tewee*, 309 P.3d at 793.

The court violated Mr. Restorff's right to a jury trial by increasing his sentence based on "facts" that had not been proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 499; *Garrus v. Sec'y of*

Pennsylvania Dep't of Corr., 694 F.3d 394, 406 (3d Cir. 2012). The state failed to prove that Mr. Restorff's conviction under the broad Oregon statute was factually comparable to the more narrow Washington statute. *Tewee*, 309 P.3d at 793. The case must be remanded for resentencing. *Id.*

B. All of Mr. Restorff's prior class B felony convictions should have "washed out" because more than ten years had passed since his most recent conviction.

Prior convictions for class B felonies are not included in an offender score if the accused has spent ten consecutive years in the community without conviction following his/her most recent conviction or release from confinement. RCW 9.94A.525(2)(b). The state bears the burden of showing by a preponderance of the evidence that a prior conviction adds a point to the accused's offender score. *Ford*, 137 Wn.2d at 480.

Because Mr. Restorff's most recent prior conviction, dating from 2002, was more than ten years before the current offense, all of his prior class B felonies should have washed out. CP 5; RP 40; RCW 9.94A.525(2)(b). Respondent erroneously claims that Mr. Restorff agreed to the inclusion of all of his prior convictions. Brief of Respondent, pp. 25-26. This is incorrect. Mr. Restorff agreed that he had been convicted

of the prior offenses. He did not agree that they should be included in his offender score.[2]

Respondent mischaracterizes Mr. Restorff's argument, suggesting that he challenges "the dates listed" for each prior conviction. Brief of Respondent, p. 26. This is incorrect. Mr. Restorff does not challenge the date of each prior conviction. Rather, he asserts that the state failed to allege or prove any intervening convictions that would prevent the prior offenses from washing out. *See* Appellant's Opening Brief, pp. 2-17. Nor did the state prove or obtain agreement as to when Mr. Restorff was last released from custody. RP 256.

Notably, the state does not argue that the prosecution provided evidence proving that Mr. Restorff's 1981-1986 convictions had not washed out. Brief of Respondent, pp. 25-26. The failure to argue this point can be treated as a concession on appeal. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The court erred by using convictions for class B felonies that were twenty-seven to thirty-three years old to increase Mr. Restorff's offender

[2] In fact, Mr. Restorff explicitly stated that his agreement that he had committed the 1991 Oregon offense was not a stipulation that it added a point to his offender score. RP 272. This example demonstrates that Mr. Restorff's agreement that he had committed the offenses was not an agreement to their inclusion in his offender score.

score. RCW 9.94A.525(2)(b). The case must be remanded for resentencing. *Id.*

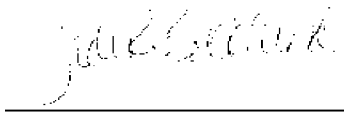
CONCLUSION

The court violated Mr. Restorff's right to counsel by failing conduct adequate inquiry into the breakdown of his relationship with his defense attorney. Mr. Restorff's conviction must be reversed.

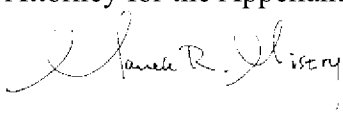
In the alternative, Mr. Restorff's 1991 Oregon conviction was not comparable to a Washington statute. The court also erred by using Mr. Restorff's 1980-1986 convictions to increase his offender score when the offenses should have washed out. Mr. Restorff's case must be remanded for resentencing.

Respectfully submitted on May 1, 2014,

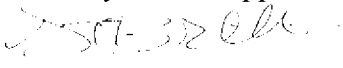
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Timothy Restorff, DOC #273329
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

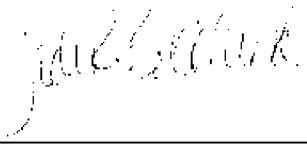
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 1, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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